Chapter 8
Negotiating the 'Sacred' Cow: Cow Slaughter and the Regulation of Difference in India

Shraddha Chigateri

8.1 Introduction

Cow slaughter and the consumption of beef are highly volatile, emotive and politicised subjects in India. At the heart of the debates on cow slaughter and the consumption of beef is the avowed sacredness of the cow in Hindu India. In an apparent paradox, however, 'bovine' meat, according to statistics published by the Food and Agricultural Organisation, is the most highly produced and consumed meat product in the country (FAO 2005).[1] Moreover, it is the ethic against cow slaughter that finds legal expression in the prohibitions and restrictions on the slaughter of cows across several states of the country. Whilst the cow is not granted 'constitutional immunity' from slaughter (Baxi 1967: 347), cow slaughter is the subject of legal prohibitions and restrictions in several states in India. These prohibitions and restrictions on cow slaughter are variously tempered by the 'use value' of the cow and by varying definitions of what cannot be slaughtered. The legal justifications for the prohibitions are to be found in Article 48 of the Constitution of India, which is framed in terms of a scientific organisation of animal husbandry,

S. Chigateri (✉)
University of Warwick, Coventry, UK; University of Keele, Staffordshire, UK
e-mail: shraddha.chigateri@gmail.com

[1]Whilst poultry has seen an exponential growth of about 11% in terms of both consumption and production between the years, 1990–2002, it is still beef and buffalo meat taken together that comprise the largest meat product that is both produced and consumed in the country (FAO 2005). Similarly, according to statistics produced by the Indian Department of Animal Husbandry, Dairying and Fisheries, which has compiled figures in relation to meat production from FAO statistics for the years 1981–2004, in 2004, India produced 1,483,000 tonnes of beef and veal. In comparison, India produces 1,715,000 tonnes of poultry (which is the highest meat product taken as a category by itself), and 239,000 tonnes of mutton and lamb. If the figures for bovine meat were to be taken together however, the total tonnage of both would be 2,966,000 tonnes, making it the most produced meat product in the country (see Report of the Department of Animal Husbandry, Dairying and Fisheries 2006: 73).

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rather than a *religious* belief in the sacredness of the cow. Whilst the language of the protection of cattle within a 'scientific-agrarian development' frame elides the question of 'religious/cultural difference' in the regulation of cow slaughter, this has not gone unchallenged either by case law brought by Muslim butchers, tanners and cattle dealers, or even by the numerous calls over the decades by Hindu groups of various hues for a *total* ban on cow slaughter.[2]

In this paper, I am interested in analysing the ways in which juridical discourse has engaged with the religious bases of the prohibitions and restrictions on cow slaughter. I examine the Constituent Assembly debates on Article 48, and the significant body of Supreme Court case law on the scope of Article 48 in order to identify whether or not juridical reasoning recognises and accommodates religious *differences* in the regulation of cow slaughter. Given that secularism and constitutional secularism in particular, purportedly provide the legal framework for analysing how the state is to deal with religious questions in a democratic, plural society, the further concern at the heart of this paper is – do the stipulations on cow slaughter abide by the principles of constitutional secularism?

The argument that this paper makes is that juridical discourse on cow slaughter, supposedly based on an economic and ecological understanding of the *use* value of cows in a predominantly agrarian economy, is predicated on a fundamental constitutive elision of the religious aspects of cow slaughter. This elision both masks the prioritising of dominant-caste Hindu identity in the regulation of cow slaughter *and* it glosses over religious *differences* over the sacredness of the cow.[3] The 'secular' garb of a dominant-caste Hindu ethic in effect creates a chimera that results in the persistent non-recognition of the diversity of conceptions over the human relationship to ecology in the specific context of an agrarian economy. Such a move is at the expense of the even-handed recognition of all religious sensibilities, and strikes at the heart of Indian secularism. The paper further argues that whilst it is important to question the *legitimacy* of state intervention in cow slaughter *within* the frameworks of secularism, the juridical discourse against cow slaughter also poses questions for the stability of the category of constitutional secularism.

[2] A total ban on cow slaughter is a peculiar expression which usually refers to a ban on the slaughter of a cow of any age, and a ban on the slaughter of bulls, bullocks and calves as well. It sometimes also includes buffaloes. See further in the next section.

[3] I use the term 'dominant-caste Hinduism' throughout this paper to invoke the complex histories of dalit engagement with Hinduism, cognisant both of the oppressive meanings of Hinduism for dalit communities, as well as the struggles of dalit communities to be a part of a more humane and diverse Hindu community. The debates between Gandhi and Ambedkar on the relationship between caste and Hinduism can be seen as emblematic of this history. See especially Ambedkar (1936a, b, 1948, 2002) for a dalit critique of the relationship between caste and Hinduism. All references to Hindu, Hinduism in the rest of the paper are to be read in terms of a deeply contested terrain of what constitutes Hinduism.

8.2 Mapping the Regulation of Cow Slaughter in India

Article 48 of the Constitution of India, a Directive of State Policy, provides the basis for legislative efforts at regulating and prohibiting cow slaughter in India. It reads:

> The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and other milch and draught cattle.

Drawing their legitimacy from this article, most states in India[4] have varying prohibitions and restrictions on the slaughter of cattle, on the transport of cattle for the purpose of slaughter, and even on the sale, usage and possession of beef. These prohibitions and restrictions are tempered by differing conceptions of the 'use value' of the cow and other bovine animals.[5] For instance, older *cows* maybe slaughtered in West Bengal and Assam upon licence, whereas in Gujarat, the so-called 'total' ban on 'cow slaughter' in fact translates into a prohibition on the slaughter of cows, bulls and bullocks of any age. The state of Karnataka currently provides something of a halfway house between Gujarat and West Bengal – the slaughter of cows, and the calves of cows and buffaloes is prohibited, whilst the slaughter of bulls, bullocks, and buffaloes is permitted upon the issuance of a certificate that either the animal is over 12 years old or permanently incapacitated from providing milk or being used as draught cattle.[6] However, the law in Karnataka is all set to change with the recent enactment of the Karnataka Prevention of Slaughter and Preservation of Cattle Bill, 2010, which extends the prohibitions on slaughter to any cow, calf, bull, bullock or buffalo, thereby promulgating a total ban on the slaughter of cattle, a wide-ranging and stringent prohibition indeed.[7]

In spite of the legal prohibitions on cow slaughter across the country, beef is both produced and consumed by several communities in the country. The communities that contravene the taboo on beef-eating in India are historically marginalised,

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[4]The parliament and state legislatures derive their power to legislate under Article 246 of the Constitution of India, read with Schedule 7, which divides subject matters in terms of a union, state and concurrent list. The regulation of cow slaughter is understood to be a state subject-entry 15 of List II to the seventh schedule (which enumerates the state list) reads – 'Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice'. This is the source of authority of states to legislate on the matter.

[5]For an enumeration of the state laws on cow slaughter, see the report of the National Commission on Cattle 2002, available at and last accessed on 23 June 2009.

[6]See the Karnataka Prevention of Cow Slaughter and Cattle Preservation Act, 1964.

[7]The Bill was recently passed by the two Houses of the Karnataka Legislature amidst widespread protests. It is currently (September 2010) pending the approval of the Governor of the State who has sent it to the President for assent. Apart from the category of animal that falls within the purview of prohibition, state enactments also prohibit activity *around* the slaughter of cows, for instance, prohibiting the export of cattle for the purpose of slaughter (Delhi). Some states even prohibit the sale and purchase of cows for the purpose of slaughter [Madhya Pradesh], as well as the possession of beef that has been slaughtered in contravention of the law [Madhya Pradesh]. The state of Karnataka is the latest to promulgate a total ban. The recent law also prohibits the sale, usage and possession of beef. Contravention of the law incurs imprisonment from 1 to 7 years, with a fine of Rs 25,000–50,000, a draconian law indeed!

minority communities: Muslim, Christian, dalit and indigenous communities.[8] Given the hegemonic sway that the dominant discourse on cow slaughter and consumption of beef have had, in many states, this has meant that the production of beef has gone underground: either through the mass transport of cattle to states where slaughter is permitted, or through the production of beef through illegal slaughter houses. It is estimated that along with the 3,600 legal slaughterhouses in the country, there are a further 32,000 unlicensed ones (Krishnakumar 2003).

However, the prohibitions against cow slaughter in India are either seen as too 'lenient' or too inadequately implemented by a continuously multiplying and increasingly legitimate Hindu-right.[9] The Hindu-right has mobilised, deployed and re-deployed the symbol of the cow as both a marker of religious difference and of historical injury and impotency – that in a newly independent Hindu dominant India, cows were not granted complete constitutional protection through a total ban on cow slaughter.[10] This is evidenced by the recurrent calls over the decades for a total, national ban on cow slaughter.[11]

The circulation of the symbol of the cow as a marker of historical injury and impotency, and as a marker of cultural difference extraordinaire, is especially potent when it comes to discourses that seek to justify as well as 'explain' instances of communal violence. For instance, in the National Commission on Cattle report

[8] See KS Singh (1995), Osella (2008) and Chigateri (2008).

[9] The traditional Hindu right, or the Sangh Parivar of the BJP-RSS-VHP-Bajrang Dal now operates along with several new and breakaway groups. For instance, in Karnataka, groups such as the Sri Ram Sene (which gained notoriety with their brutal moral policing of women in Karnataka over the last year, and which is drawn from the ranks of the Bajrang Dal and the Shiv Sena) along with groups such as the Hindu Yuva Sena in Mangalore, Karnataka Komu Souharda Vedike in Udupi, have been involved in a range of activities which the media and the intelligentsia have in recent times evocatively termed 'Hindutva Talibanisation'. Some of the concerns that have been central to these groups are culturally divisive issues – religious conversion, cow slaughter and the moral policing of women. (See for instance, Sanjana 2008, 2009). Much has been written about Hindutva, as a violent majoritarian ideology of 'true, native nationalism' of the Hindu right, and it is beyond the scope of this paper to reprise these. Suffice it to say that at the heart of Hindutva 'lies the myth of a continuous 1,000-year struggle of Hindus against Muslims as the structuring principle of Indian history' (Basu et al. 1993: 2).

[10] The story of the mass mobilisation of the symbol of the cow has a longer history, of which the cow protection movements of the late nineteenth century (which came to a head when in 1888 the North-Western Provinces High Court decreed that a cow was not a sacred object) are an integral part, DN Jha (2002: 18–20); also see Sandria B. Freitag (1980). Also see the National Commission on Cattle, 2002, supra n. 5.

[11] See Jha (2002). More recently, in the run up to the 2004 general election, the BJP led government sought to introduce a central Bill banning cow slaughter. This Bill was introduced as a result of the report of the National Commission on Cattle in 2002, which suggested a comprehensive ban on the slaughter of the cow and its progeny. One of the more controversial recommendations of the report was that a person who contravened the legal prohibitions on cow slaughter was to be tried under the Prevention of Terrorism Act (POTA), 2002. Although the Bill was not passed owing to a lack of consensus on the issue, and the erstwhile BJP-led government has not been in power in the centre since 2004, the issue of cow protection is by no means a dead one, as attested to by the various laws on cow slaughter that have been passed by BJP led state governments in the last several years, viz., Gujarat, Uttarakhand, Karnataka.

on cow slaughter, an entire appendix based on Zenab Banu's survey of communal violence in India from the eighteenth century, catalogues violence attendant upon infringements of Hindu sentiment in relation to the cow. Similarly, Asghar Ali Engineer catalogues the 'causes' of communal violence in his record of such violence to be, amongst other reasons, alleged cases of cow slaughter and the purchase of calves for slaughter (Asghar Ali Engineer 2004, 2005). Recent newspaper reports from Karnataka also attest to the links between cow slaughter and communal violence. For instance on March 4, 2008, the newspapers carried the news that two Muslims and a Dalit were stripped, beaten and publicly humiliated by Bajrang Dal activists in Shantipura in Karnataka's Chikmaglur district for allegedly killing a cow.[12]

The causal links between cow slaughter and communal violence are however, by no means self-evident, and may in fact speak more to the *production* of a communal politics in India.[13] As Jodhka and Dhar note in their analysis of the killings of five dalit men in Dulina near the Jhajjar town of Haryana for an allegedly mistaken impression of cow slaughter being committed openly, the facts are not only difficult to ascertain in the midst of violence given the varying versions of the event, but are also far more complicated than a 'case of spontaneous response of an "innocent crowd" to an "emotive" issue, albeit by "mistake"' (Jodhka and Dhar 2003). Whilst it is far from my argument that each instance of communal violence is somehow self-evidently caused by dominant-caste Hindu sentiment around cow slaughter, the argument that is at the heart of this paper is that the symbol of the cow is indeed a potent symbol of religious difference, and that this symbol has been mobilised, and deployed for particular ends by the Hindu right.

Further, it is my argument that the law has been a site of this production of difference, both in the ways in which it upholds the dominant-caste Hindu ethic against cow slaughter through the various state legislations, as well as by the consistent non-recognition of the varying meanings of cow slaughter for diverse communities. As I will show in the next few sections, the legal arguments, which are purportedly based on an economic, ecological understanding of the *use* value of cows in a predominantly agrarian economy, mask and elide the prioritising of dominant-caste Hindu identity in the regulation of cow slaughter. This elision is at the expense of the even-handed recognition of all religious sensibilities, and strikes at the heart of Indian constitutional secularism. By analysing the ways in which the ethic against cow slaughter is validated and reiterated within constituent assembly and wider judicial discourse, this paper seeks to shed light on the processes of juridical normalisation of the ethic against cow slaughter in India.

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[12] See Statesman news report (2008). Also see Menon (2005).

[13] The literature detailing the 'causes' of communal violence, and indeed how one may analyse mass violence is vast and complex, (see especially Baxi 2002, Das 1990) as is the literature accounting for the relationship between communal violence and cow slaughter (Pandey 1983, Freitag 1980, Robb 1986, Yang 1980). An analysis of the relationship between communal violence and the deployment of the symbol of the cow is not within the scope of this paper, as these call for detailed ethnographic contextualising and accounting for events, in the manner of Anupama Roy's analysis of Sirasgaon (Rao 1999).

8.3 The Constituent Assembly debates on Cow Slaughter and Hinduism . . . 'Now You See It, Now You Don't'

Cow slaughter was presented as a subject worthy of constitutional debate and inclusion through an amendment (no. 72) to Article 38-A, mooted by Pandit Thakur Dass Bhargava in the proceedings of the Constituent Assembly of India, the body which wrote and adopted the Indian Constitution.[14] This amendment was to eventually find its way, largely un-amended, into the present Constitution as Article 48. Prior to the introduction of this amendment, there were calls from a few members of the Assembly to include an article prohibiting cow slaughter in the Fundamental Rights of the Constitution, which indeed would have given the cow unique constitutional protection.[15] However, it was upon the insistence of Babasaheb Ambedkar, understood to be the father of the Indian Constitution, and importantly, the pioneer of the dalit movement in India, that the Art on cow slaughter not only was included as a Directive Principle of State Policy rather than as a Fundamental Right, but also took its current wording – in terms of a scientific organisation of animal husbandry, rather than reflective of Hindu sentiment on cow slaughter.[16] Prof T.N. Madan, however, attributes the 'secular' character of the article to Pandit Jawaharalal Nehru, who he argues 'had to threaten to resign in order to have this ban given a secular character'.[17] Whatever the provenance of the article, the inclusion of the article as a Directive Principle of State Policy, rather than as a Fundamental Right was understood by Pandit Bhargava both as a 'sacrifice' on the part of the Hindu community, and, given the justiciability, i.e. the legal enforceability, of Fundamental Rights as opposed to Directive Principles, as reflective of a sentiment of non-coercion towards non-Hindus. However, as another member of the Constituent Assembly, Seth Govind Das, who called instead for a wider ban on the slaughter of cows,

[14]The amendment read as follows: '38-A. The State shall endeavour to organise agriculture and animal husbandry modern and scientific lines and shall in particular take steps for preserving and improving the breeds of cattle and prohibit the slaughter of cow and other useful cattle specially milch and draught cattle and their young stocks.' Two of the key players in the inclusion of this article in the Constitution were Pandit Thakur Das Bhargava, member from East Punjab and Seth Govind Das, member from CP and Berar. See the Constituent Assembly Debates (Proceedings) – Vol. VII, Wednesday, the 24th November 1948, available at parliamentofindia.nic.in/ls/debates/debates.htm last accessed 23 June 2009. All quotations and references to the Constituent Assembly debates are drawn from the debates on this day, unless stated otherwise.

[15]This unique constitutional protection would have meant that the protection of the cow would have been treated on par with other *human* fundamental rights such as right to life, right to equality, etc. This would have given new meaning to ecological concerns about discrimination on the basis of species. Of course, given that the laws in India *do* protect the cow, it seems that in effect, the protection of the cow does indeed supersede human rights, as I have argued with regard to the fall outs of the food hierarchy in relation to dalit communities (Chigateri 2008).

[16]See Pandit Thakur Das Bhargava's statement to the Constituent Assembly, *supra* n. 12.

[17]He notes, 'the Hindu lobby, which had the informal patronage of the President, Dr Rajendra Prasad, had wanted a general ban, and Nehru none of it. As early as 1923, when he was the Mayor of Allahabad, he had persuaded the municipal Board to reject a proposal to prohibit cow slaughter' (Madan 1993: 687).

bulls, bullocks and calves[18] argued, the reason for the inclusion of the article into a Directive Principle of State Policy was because the Fundamental Rights dealt with *human* rights, and envisaged no scope by the drafters for the protection of *animal* rights in the same vein as human rights.[19]

One of the central planks of the arguments for the protection of the cow made both by Pandit Bhargava and by Seth Govind Das was in relation to the *usefulness* of the cow in an agrarian economy. This argument especially for Pandit Bhargava was couched in terms of the centrality of the cow in agricultural production (draught power, manure, transport) as well as to food sufficiency (cereal and milk production and sufficiency):

> To grow more food and to improve agriculture and the cattle breed are all inter-dependent and are two sides of the same coin. [...] The best way of increasing the production is to improve the health of human beings and breed of cattle, whose milk and manure and labour are most essential for growing food. [...] From both points of view, of agriculture and food, protection of the cow becomes necessary.

Whilst Pandit Bhargava was careful to explicitly state that he appealed to the Assembly not in the name of *religion*, but in the light of the economic requirements of the country, Seth Govind Das's argument was more critical of those who were contemptuous of 'religiously minded' people. Further, he complicated the understanding of religion that underlay the ethic of cow protection, '[...] cow protection is not only a matter of religion with us; it is also a cultural and economic question'. Whilst the ethic for cow protection could be justified in religious, cultural and economic terms, and whilst Seth Govind Das wanted a country that was culturally unified even though they followed different religions, he argued however, that cow slaughter was *not* an integral aspect of Muslim religion, echoing the 'essential practices doctrine' that would come to entrench itself in the debates in the Supreme Court on the meaning of religion[20]:

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[18] Seth Govind Das mooted an amendment to Pandit Thakurdas Bhargava's amendment on the following lines: 'That in amendment No. 1002 of the list of Amendments in article 38-A the words and other useful cattle, specially milch cattle and of child bearing age, young stocks and draught cattle' be deleted and the following be added at the end: 'The word "cow" includes bulls, bullocks, young stock of genus cow'. See the Constituent Assembly Debates, *supra* n. 13 – this amendment was not passed by the Assembly.

[19] See statement by Seth Govind Das, *supra* n. 12.

[20] Ronojoy Sen in his paper on the Indian Constitution and secularism traces the history of the essential practices doctrine within the discourse of the Supreme Court. He explains, 'Courts are frequently asked to decide what constitutes "an essential part of religion", and therefore off-limits for state intervention or what is "extraneous or unessential" and therefore an area in which it is permissible for the state to interfere' (2007: 9). Sen elaborates amongst other things that as the doctrine played out, the Court appointed itself the gatekeeper of what qualified as religious practice and doctrine, it 'rationalised' and 'marginalised' practices that did not meet the Court's test, and it deemed as superstitious or irrational certain religious practices (Sen 2007, also see Sen 2010). For further elaborations on this doctrine, see Baxi (2007b) and Cossman and Kapur (1999).

> The Muslims should come forward to make it clear that their religion does not compulsorily enjoin on them the slaughter of the cow. [. . .] I have read the life of Prophet Mohammad Sahib. The Prophet never took beef in his life. This is an historic fact.

Another interlocutor in the debate, Prof. Shibban Lal Saksena, member from the United Provinces (general) was far more unequivocal in his recognition of the difficulty of separating the religious aspects of cow protection from the economic aspects. Further, he found it difficult to see why, if the ethic of cow protection was based on a religious argument, it could not be enacted as law.

It was left to the Muslim members of the Constituent Assembly then to provide dissenting voices to the arguments in favour of cow protection. Rather presciently, Mr. Z. H. Lari (United Provinces) argued that it would be best if the article was included in the Fundamental Rights, rather than it being left vague and open to state governments to adopt one way or the other. He reasoned, 'Mussalmans of India have been, and are, under the impression that they can, without violence to the principles which govern the State, sacrifice cows and other animals on the occasion of Bakrid'. 'Therefore', he argued, 'if the House is of the opinion that slaughter of cows should be prohibited, let it be prohibited in clear, definite and unambiguous words'.

On the question of the integral nature of cow sacrifice to the Muslim religion, Mr Lari was equally clear, making the argument that while Islam 'does not necessarily say that you must sacrifice cow: it permits it'. Another significant argument made by Mr Lari was to locate the inconsistency of talking together about modern and scientific agriculture and of banning cow slaughter. He joined the debate with both Prof Saksena and Seth Govind Das on how the scientific management of agriculture and animal husbandry was to be carried out by reasoning, 'modern and scientific agriculture will mean mechanisation and so many other things. The preceding portion of the clause speaking about modern and scientific agriculture and the subsequent portion banning slaughter of cattle do not fit in with each other'.

Syed Muhammad Sa'adulla, another Muslim member from Assam was far more unequivocal about his opposition to the amendment. His argument was again similar to that of Mr Lari, and in some sense echoed those of Prof Saksena – if the prohibition on cow slaughter was based on religious sentiment, which Syed Sa'adulla thought it was, then it should be made clear that this was the basis of the bans, because according to him, if one were to base it on economic factors or even the scientific organisation of animal husbandry, one would have to show more robustly why cow slaughter was problematic from an economic standpoint. It is worth quoting his statement at some length:

> I do not want to obstruct the framers of our Constitution [...] if they come out in the open and say directly: "This is part of our religion. The cow should be protected from slaughter and therefore we want its provision either in the Fundamental Rights or in the Directive Principles [...] But, those who put it on the economic front [...] do create a suspicion in the minds of many that the ingrained Hindu feeling against cow slaughter is being satisfied by the backdoor. If you put it on the economic front, I will place before you certain facts and figures which will show that the slaughter of cows is not as bad as it is sought to be made out from the economic point of view [...] The motion of Pandit Bhargava is that, in order

> to improve the economic condition of the people, we should try scientific measures. That presupposes that the useless cattle should be done away with and better breeds introduced.

Syed Sa'adulla also complicated the picture of cow slaughter as a Muslim practice by making several points, each of which require attention – that there were hundreds of thousands of Muslims who did not eat cow's flesh; that it was not only Muslims who slaughtered cattle (given the population of Muslims, and the numbers of cattle slaughtered); and importantly, that for Muslim agriculturalists, cattle were as much as a capital asset as for Hindus; and further that, given that they were meat eaters, and the price of other meat was so high, they occasionally resorted to eating the flesh of the cow, albeit the barren cow. Moreover, Syed Sa'adulla questioned the argument that Hindu reverence for the cow was always reflected through a taboo on slaughter, arguing that in Assam, when there was a shortage of cattle and a prohibition on the slaughter of milch or draught cattle, it was Hindus who resorted to slaughtering cows with the argument that the cattle were unserviceable and 'dead weight'.

Syed Sa'adulla's arguments hit at the heart of the claims made in the Constituent Assembly against cow slaughter, whether these were framed in terms of avowedly secular or religious terms. As with Dr Lari, he seemed to be willing to concede ground to the arguments based on Hindu sentiment. However, pertinently, in his statement, Syed Sa'adulla questioned the scientific basis of the arguments against cow slaughter. Further, he joined debate on the ethical relationship of both Muslims and Hindus to the cow whilst calling into question the understanding that the Hindu reverence to the cow could only be expressed in terms of a taboo against cow slaughter. In fact, as he argued, this was not how it obtained – Hindus also killed cows. If the central claim of the ethic against cow slaughter rested on the usefulness of the cow, then *both* Hindus and Muslims had the same ethical relationship. Underlying Syed Sa'adulla argument are two further claims – one, that the reverence towards the cow need not be expressed only in terms of taboos on cow slaughter. In this sense, his reasoning is close to Kancha Ilaiah's (1996) who argues that 'love towards animals and eating their meat for survival is not a contradiction but a dialectical process'. Second, that the ethic of the usefulness of the cow was *not* a Hindu preserve. This rationale complicates both the relationships between Hindus and Muslims with the cow, and importantly, it leaves open to *contestation* the Hindu ethic against cow slaughter. In a similar vein, Upendra Baxi, in an early article interrogating the insertion of Article 48 into the Directive Principle of State Policy, questions the identification of the ethic against cow slaughter as expressive of indigenous social values:

> It is, indeed, an open question as to what extent [Article 48] really represents cultural or social or religious values of India of past or present. At best, sociological or theological research in both these areas may yield formidable support to protagonists of both viewpoints, though our feeling is that it may even conclusively establish that it is erroneous to think of cow-preservation or probation as 'values' in any context (Baxi 1967: 347).

Drawing on TT Krishnmachari's (a member of the Constituent Assembly) characterisation of the directive principles as a 'veritable dustbin of sentiment', Baxi

suggests that 'this would seem especially true of the [principle] pertaining to prohibition of cow-killing [...]' (Baxi 1967: 346). He argues instead that 'some articles embodied expedient intra-party compromises rather than fundamental principles of social policy. The Assembly had neither time nor inclination [...] to deal with the anxieties and fears of the few about the advisability of incorporation of the [directive]. These were tempered by the overwhelming need to offer what then seemed minor concessions in the hope that in the future they would not present major obstacles' (Baxi 1967: 347).

How then are we to make sense of the constituent assembly debates on cow slaughter? That the article was written (and assented to) in terms of the scientific organisation of animal husbandry, rather than in terms of Hindu sentiment, is without question.[21] That this article, as understood by the interlocutors to the debate, *reflected* Hindu sentiment on the matter, is also without question.[22] It is this double move, of at once reflecting Hindu sentiment while purportedly *not* doing so that has been at the heart of the juridical relationship with cow slaughter. In this double move, religious considerations come into view and then disappear, allowing for the myth that Article 48 is indeed not about religion at all, but in fact about the scientific organisation of agriculture and animal husbandry. It is this constitutive elision that simultaneously reiterates the Hindu basis of cow slaughter that has predicated the Supreme Court engagement with the issue. The consequence of this elision is that it becomes difficult to subject the Hindu basis of the taboos on cow slaughter to any serious interrogation. Instead, it provides the courts a free reign to declare upon and reiterate the Hindu sentiment behind the article. It is to the Supreme Court engagement with the religious bases of the cow slaughter bans to which we now turn.

8.4 Interrogating the Judicial Discourse on Cow Slaughter

The Supreme Court in *Mohd Hanif Quareshi and others v State of Bihar and connected petition,*[23] had the first opportunity in post-independent India to adjudicate on the constitutionality of laws banning cow slaughter. In this case, 12 petitions which challenged the constitutional validity of three enactments banning the slaughter of 'cows' passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh (traditionally considered to be the cow belt of India, given their historical

[21] Whether this is reflective of a pragmatic concession as Prof Baxi suggests, or as reflective of possibly a misguided investment in secular values is open to further investigation.

[22] Though on this issue, it must be reiterated that Syed Sa'adulla sought to complicate both Hindu sentiment as well as the Muslim relationship to the cow.

[23] 1958 AIR 731, available online at http://www.commonlii.org/in/cases/INSC/1958/46.html Pandit Thakur Das Bhargava, who was an architect of Art 48, was permitted to appear as *amicus curiae.*

involvement in the cow protection movement) were heard together by the court.[24] The constitutionality of these acts was challenged by Muslim butchers, cattle dealers and meat vendors from the three states on the grounds that the Acts infringed their right to equality, their right to practice any profession, or carry on any occupation, and their right to freedom of religion which were all guaranteed as Fundamental Rights in the Constitution.

The petitioners' argument in relation to the right to equality was that the impugned Acts unfairly discriminated between those who butchered goats and sheep and those who butchered bovine cattle. This argument was given short shrift by the Supreme Court which reasoned that the basis of the classification between the two groups was a valid one. In establishing the basis of this validity, the court reprised the argument about the usefulness of cows (and female buffaloes) as opposed to sheep and goats, to conclude that the butchers who kill each category could be placed in distinct classes as well.[25]

The second ground on which the petitioners challenged the constitutional validity of the impugned Acts was on the basis of their right to freedom of religion. Chief Justice Sudhi Ranjan Das, who delivered the unanimous judgement on behalf of the five judge bench, acknowledged, based on Hamilton's translation of Hedaya Book XLIII, that there is a 'duty of every free Mussalman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice [. . .] The sacrifice established for one person is a goat and that for seven a cow or a camel'.[26] However, the eminent justice was not convinced that this then translated into a negation of the right to freedom of religion of the petitioners. According to him, the duty enjoined by the Hedaya did not amount to an *obligatory* duty as it provided for an *option* of sacrificing a goat for one person, or a cow or camel for seven. To the petitioners' argument that the practice was for poor members of the community to sacrifice one cow for every 7 members as it was considerably more expense to sacrifice one sheep or goat for each member, Das CJ reasoned that even though there may be an economic compulsion on the part of the poorer Muslim brethren, there was no *religious* compulsion. Das CJ's vexation in relation to the arguments of the petitioners was that there was no reference to any particular Surah of the Quran that required cow sacrifice, and what was proffered as evidence in terms of enjoining Muslims to pray and make sacrifice, did not also provide evidence of the 'implications of those Verses or throw any light on this problem'.

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[24] Specifically, the impugned statutes laid down, in the case of Bihar, a total ban on the slaughter of all bovine cattle; in the case of UP, a total ban on the slaughter of 'cows', which included bulls, bullocks, heifers and calves – but not buffaloes; and in the case of MP, a total ban on the slaughter of cows and female calves, while the male calf, bulls, bullocks, buffalo (male or female, adult or calf) could be slaughtered by obtaining a certificate. Each of the statutes minimally protected the cow and female calf from slaughter; whilst the Bihar legislation extended this ban to all bovine cattle, UP extended the ban to the cow and her progeny but not buffaloes, and MP allowed for the slaughter of all other bovine cattle upon obtaining a certificate.

[25] Supra, n. 22.

[26] Ibid.

To the argument that Indian Muslims had been sacrificing cows since time immemorial, and that the practice is 'sanctioned' if not 'enjoined' by their religion, the Chief Justice holding onto the interpretation of 'obligatory' practice opined along with the respondents that there were many Muslims who did not sacrifice a cow on Bakr Id Day. Pointing to the tolerance of Muslim rulers who also prohibited cow slaughter, the court dismissed the claim of the petitioners on the grounds of religion.

The only argument of the petitioners that was considered positively by the court was that the impugned statutes infringed their right to practice any profession or carry on any occupation. In assessing this claim, the court subjected each of the impugned statutes to a reasonableness test. The court took note of the vast numbers of Muslim butchers and those involved in ancillary occupations that would be affected by the statutes. Significantly, the court also acknowledged that beef or buffalo meat was an item of food for a large sections of poorer people belonging to the Muslim, Christian and Scheduled Castes communities, demand for which was based on the low prices of beef and buff.

However, in reaching its conclusion on the constitutionality of the impugned statutes, the court reprised the arguments on the usefulness of the 'cow' – in the production of milk for food, the use of bulls for draught power and manure for agriculture.[27] Interestingly, the court also examined the history of the status of the cow in *Hindu* India, and utilised quotes from the Rg and Atharva Vedas to analyse the contradiction of the killing of cows for food in Rg Vedic times, as well as the cow's eventual rise to divinity. In analysing whether to take into consideration the passionate Hindu sentiments against cow slaughter, Das CJ opined:

> There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.[28]

Based on all these considerations, the Supreme Court reached the decision that the total ban on the slaughter of cows of all ages, and the slaughter of calves of cows and buffaloes was to be upheld. Further, it laid down that the ban on buffaloes and bulls, bullocks was valid so long as they were capable of being used in milch and draught cattle. However, the Court reasoned that the ban on buffaloes and bulls after these ceased to be capable of yielding milk or of breeding or working as draught animals was not in the interests of the general public and was invalid. Here, the court relied on the usefulness of bovine animals as milch and draught cattle, reasoning

[27] Ibid.
[28] Ibid.

further that once the bovine animals were no longer of any use, they were in fact a burden on resources.[29]

One of the stark issues that this judgement raises is the *differential* treatment by the Court of Muslim and Hindu practices in relation to cow sacrifice and reverence. As Upendra Baxi writing in 1967 suggests:

> One gets the impression that the rigorous methods employed by the Court for the ascertainment of the Islamic precept were *not* extended to the determination of the Hindu's reverence for the cows [...] it is extremely doubtful if scrupulous research in Hindu religious traditions (in the same manner as the Supreme Court investigated the contention of the Muslims that they were enjoined by their religion to offer the sacrifice of the cows on their holy day) will endorse the view that cow-killing is prohibited by these traditions (1967: 349, 353).

As Baxi suggests, the argument that the petitioners did not bring forth a robust argument in support of their right to religion is untenable because the court did seek out resources to make the argument that the cow sacrifice was not obligatory on Muslim communities. The court, on the other hand, did not hesitate to make proclamations on the nature of Hindu sentiment on cow reverence, drawing only on a couple of citations from Kane, despite as Baxi suggests a 'formidable diversity of scriptural and doctrinal opinions on this matter' (1967: 353). Further, the court reiterated and entrenched as legitimate the argument that the *cow* was to be protected because it was useful. But this argument relies on a tenuous distinction between the cow and the buffalo. Whilst it was acknowledged by the Court that the buffalo was more useful as it yielded more milk, it was the total bans on *cow* slaughter that were upheld, and not the *total* bans on buffaloes, as female buffaloes, once they were past the age for yielding milk could be slaughtered. Why the cow did not become a burden on resources past milk-yielding age remains unclear, unless one locates the basis of cow protection in *uncontested* Hindu sentiment.

There have been several other cases on cow slaughter that have come before the courts and especially the Supreme Court, over the years.[30] Whilst there was no

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[29] In upholding a total ban on the *cow*, the argument made was that since the buffalo has a higher yield of milk, it was the cow that was in more need of the protection of the law. The presumption behind the justice's argument ironically was that buffaloes would not be slaughtered because they were more useful, whereas the cow because it was not as useful as the buffalo required protection – thereby compulsorily enjoining all agriculturalists to the usefulness of the cow.

[30] Apart from the cases that involved the constitutionality of bans on cow slaughter, there were also a series of cases in the 1960s and 1970s that sought Supreme Court intervention on questions of whether or not appeals to votes and speeches made to voters in the name of cow slaughter violated the sections of the Representation of the People Act 1951. See for instance – *Narbada Prasad v Chhagan Lal & Ors [1968] INSC 166; Maubhai, Nandlal Amersey v Popatial Manilal Joshi & Ors [1969] INSC 2; Kanti Prasad Jayshanker Yagnik v Purshottamdas Ranchhoddas Patel & Ors [1969] INSC 13; Virendra Kumar Saklecha v Jagjiwan & Ors [1972] INSC 91.* These cases are part of a larger group of cases, which culminated in the decisions of the Supreme Court in what have been termed the Hindutva judgements (see Cossman and Kapur 1999, Sen 2007, Baxi 2007b). Whilst these judgements have made a lasting impact on the nature of Indian secularism, a detailed engagement with these cases is outside the purview of this paper. However, it is important to note that in his analysis of constitutional secularism, Baxi (2007b) distinguishes between two forms of secularism: rights oriented secularism and governance oriented secularism, and according to this

shift in the position of the Court on the refusal to the recognise cow sacrifice as an essential aspect of *Muslim* practice,[31] and whilst many of the decisions of the Court continued to reflect the *Hindu* basis of the regulation of cow slaughter,[32] one of the features of several decisions of the Court over nearly a 40 year period was the understanding that a *total* ban on slaughter was *unreasonable*. As Kirpal, J. noted in his decision in *Hashmatullah v State of Madhya Pradesh & Ors*[33]*:*

> Three different constitution Benches of this Court [. . .] have held that the total ban on slaughter of bulls and bullocks in ultra vires the constitution [...] The consistent view of this court since 1958 [has been] that [a] total ban on slaughter of bulls and bullocks which had become old amounted to an unreasonable restriction on the fundamental rights of the butchers.[34]

However, this long-held position of the Supreme Court was to see a marked shift in 2005, when a seven-judge bench presided over the case of *State of Gujarat vs Mirzapur Moti Kureshi Kassab Jamat and Ors.*[35] In this case, the constitutionality of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994 was challenged as it provided for a *total* ban on cow slaughter, viz., it called for a complete ban on all cows and her progeny, viz., cows, bulls, bullocks, heifers and calves. As will be recalled, in *Hanif Quareshi,* the court argued that it was only useful cattle (apart from the cow itself and calves) that could be protected from slaughter. Bulls and bullocks, as per the later decisions of the Supreme Court, became useless past the

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distinction the cases related to the Representation of People Act falls within governance oriented secularism and the 'rights' claims that the body of the paper deals with under rights oriented secularism.

[31]The judgement in *State of W.B v Ashutosh Lahiri [1994] INSC 587* is a case in point. In this case, the petitioners challenged the validity of the exemption from slaughter of cows on religious grounds on the day of Bakr Id. In this case, the West Bengal government had, it was contended, wrongly exempted the slaughter of healthy cows on the occasion of Bakr Id from the laws against cow slaughter on the ground that such exemption was required to be given for the religious purpose of the Muslim community. The Supreme Court, speaking through Majumdar, J. on behalf of a three judge bench, reiterated the decision of the larger bench in the case of *Hanif Quareshi* (above) with the reasoning that cow sacrifice was indeed not an obligatory practice on the Muslim religion.

[32]For instance, in the case of *Municipal Corporation of the City of Ahmedabad & Ors. v Jan Mohammed Usmanbhai & Anr 1986 [INSC] 85* the reasonableness of two standing orders that directed slaughter houses to remain closed on seven days (the 'birthdays' of important Hindu figures) was upheld on the grounds of 'public' interest. RB Misra, J, speaking for the court reasoned that, 'Rama and Krishna are the beloved of the Hindu Pantheon and are worshipped by large sections of the people. [...] Their birthdays are generally observed by the people not merely as days of festivity but also as days of abstinence from meat. One cannot, therefore, complain that these days are ill chosen as holidays. [. . .]'. This case is illustrative of two things – the *Hindu* basis of the bans, and a conflation of Hindu interest with public interest without an interrogation of what this means for Muslim and other minority communities. There are other decisions of the court that also receive similar treatment. See *Haji Usmanbhai Hasanbhai Qureshi & Ors v State of Gujarat [1986] INSC 84.*

[33][1996] INSC 716.

[34]Ibid.

[35]2005 8 SCC 534.

age of 15. The impugned amendments to the Act in this case sought to once again change what could constitutionally be prohibited from slaughter.

By a majority of six, the Supreme Court upheld the validity of the impugned amendment. The reasoning that the court used in order to distinguish the present case from *Hanif Quareshi* was as follows. Since the time of *Hanif Quareshi,* there were several changes in India – firstly, a holistic environmental policy had been inserted into the constitution, of which the judges in *Hanif Quareshi* did not have the benefit.[36] Further, according to the court, food security was a significant concern then, whereas now, 'our socio-economic scenario has progressed from being gloomy to a shining one'. This reasoning of the court was critical of both the understanding that useless cattle were a drain on the resources, and that beef and buff contributed to food security by providing sustenance to a diverse range of communities.

Instead the court reasoned that in fact bulls and bullocks continue to be useful past a certain age, in terms of the added benefits of urine, dung – manure and biogas, especially in this age of alternate sources of energy (the usefulness of the cow, whatever its age, the court noted was already a constitutionally settled position, qua *Hanif Quareshi).* Moreover, the court opined, even though Article 48 used the language of 'protecting' cattle based on functionality, it could not be interpreted to mean the lack of protection for cattle that were no longer functional. In strengthening its case for the protection of useless bulls and bullocks, the court relied on Article 51 A(g) to note that showing compassion towards animals meant *protecting useless cattle from slaughter*. Furthermore, by speaking of compassion for living creatures in universal terms, the court excluded the possibility of any discord and debate on the issue of whether compassion towards living creatures *always* meant prohibitions from slaughter. In this sense, the court showed a complete lack of empathy with the diversity of sentiment on the question of cow slaughter:

> The concept of compassion for living creatures enshrined in Article 51A (g) is based on the background of the rich cultural heritage of India -the land of Mahatama Gandhi, Vinobha, Mahaveer, Budha (sic) Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society [...] The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased. A cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless'. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house [. . .] We have to remember: the weak and meek need more of protection and compassion.

The compassion of the court towards the 'weak and meek' did not however extend to the Muslim butchers' claims that the impugned laws impinged on their livelihoods. The court, contra *Hanif Quareshi,* opined:

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[36]The policies that the court referred to are to be found in Articles 48A and 51A which were inserted into the Constitution through the 42nd Amendment in 1976. Article 48A reads, 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'. The relevant portion of Article 51A reads, 'It shall be the duty of every citizen of India (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

> In the present case, [...the] ban is not on the total activity of butchers (kasais); they are left free to slaughter cattle other than those specified in the Act [...] There is no escape from the conclusion that the protection conferred by impugned enactment on cow progeny is needed in the interest of Nation's economy. Merely because it may cause 'inconvenience' or some 'dislocation' to the butchers, restriction imposed by the impugned enactment does not cease to be in the interest of the general public.

And on the question of the consumption of beef which *Hanif Quareshi* had recognised as an aspect of food consumption patterns of communities in India, the court was even more unequivocal:

> Desirable diet and nutrition are not necessarily associated with non-vegetarian diet and that too originating from slaughtering cow progeny. Beef contributes only 1.3% of the total meat consumption pattern of the Indian society. Consequently a prohibition on the slaughter of cattle would not substantially affect the food consumption of the people.[37]

There are several moves that the Supreme Court makes in arriving at its decision that the cow and her progeny are inviolable in India, whether or not they were useful[38]; that it is an *Indian* ethic to show compassion (to useful animals, or animals which have once been useful?) *through* non-slaughter (evincing a particular conception of ecological harmony); that beef conception was not high[39] and neither was it necessarily desirable; that *prohibition* of cow slaughter was the means with which to protect the national economy, reliant as it was on agriculture; and further that for the greater national economic good, some people (Muslim butchers) would have to be 'inconvenienced' or 'dislocated'.

All these formulations that the court upheld as *Indian* values, as necessary for the *Indian* economy are, as I have argued throughout this paper, highly contested values, evoking a diversity of conceptions of modes of living, of the human relationship to ecology and other living beings, as well as on the nature of the relationship between law and society. Central to much of the preceding sections has been my argument that the courts have consistently upheld the Hindu conception of cow slaughter, without properly interrogating the nature of this conception as regards Hinduism, whilst they have simultaneously *rejected* other conceptions of cow slaughter. If anything, by the time the court pronounced upon *Gujarat* v *Mirzapur,* these understandings had hardened into an even more brutal negation

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[37] Supra, n. 36 I have written elsewhere on how the links between the ethic of non-violence towards animals (evoked here in terms of compassion towards animals) and the superiority of the vegetarian ethic have been powerfully contested by dalit communities (see Chigateri 2008).

[38] The court did not subject the buffalo and her progeny to the same level of scrutiny. On the question of the difference between the buffalo and the cow, in *Haji Usmanbhai* supra n. 31, it was held that there was a valid distinction (in relation to the right to equality) between butchers who dealt with buffaloes and those who dealt with cow progeny, as bulls and bullocks were used as draught power, whereas, male buffaloes were not. This argument unravels, however, if the 'usefulness' of cow progeny no longer provides the basis upon which slaughter is prohibited. As Kancha Ilaiah asked in his inimitable several years ago – was the buffalo not worthy of worship?

[39] This is in spite of FAO and DAHD figures to the contrary – see supra, n. 1.

of difference and diversity.[40] The question that has been fundamental to much of these elucidations is on the *legitimacy* of the legal intervention in the context of cow slaughter. On what basis can we question the legitimacy both of the non-interrogation of the Hindu basis of prohibitions on cow slaughter, as well as the persistent negation of diverse modes of being? This is the question that I turn to in the next section of this paper, which deals with secularism and particularly, constitutional secularism. Before moving on, however, I would like to point out the only upshot to this judicial scenario in recent years is that in *Akhil Bharat Goseva Sangh v State of AP and Ors; Umesh and Ors v State of Karnataka and Ors*,[41] in deciding upon the constitutionality of a partial ban on cow slaughter in the states of AP and Karnataka, the Supreme Court held that the decision in *Mirzapur* did not mean that the slaughter of cattle by itself was unconstitutional.

8.5 Secularism, Cow Slaughter and the Regulation of Difference

There is much that has been written on the meanings, history and nature of secularism in India, as well as on its effectiveness as an arbiter of religious differences.[42] In this section, I am interested in engaging briefly with the more discrete juridical discourses on secularism, which has been characterised as *constitutional secularism.* I do so with two purposes, in order to ascertain the legality and legitimacy of state intervention in the arena of cow slaughter within the terms of constitutional secularism, and secondly, to interrogate what the juridical discourse on cow slaughter may tell us about the nature of constitutional secularism.

Upendra Baxi, one of the foremost and distinguished interlocutors of the debates on constitutional secularism characterises constitutional secularism as 'a set of adjudicatory/interpretive practices and policies concerning the meaning and scope of the state-religion nexus' (2007b: 48). He argues that whilst debates on the wider category of secularism may proceed with barely any reference to the precise nature of this adjudicatory/interpretive process, constitutional secularism theorists take as their starting point the importance of analysing the contours of the adjudicatory/interpretive process to an analysis of secularism.[43]

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[40] That the issue to cow slaughter has been harnessed for a politics of difference based on religious lines is evident from the Gujarati case. For instance, after this judgement, the Gujarat government set about giving effect to this ban by proposing mobile laboratories equipped with instruments that will detect 'on the spot' whether the meat being transported or sold is of 'cow progeny', Gujarat State News (22 Aug. 2006).

[41] MANU/SC/1795/2006.

[42] For some of the landmark texts on secularism in India, see Smith (1963), Galanter (1971), Madan (1987, 1993, 2006), Nandy (1997, 2002, 2007), Bhargava (1997), Needham and Rajan (2007), Cossman and Kapur (1999). Also see Nigam (2006) for an interesting elucidation of the Indian debates on secularism.

[43] Prof Upendra Baxi, in his several pieces on constitutional secularism in India has chastised the interlocutors to the debates on secularism for their repeated neglect of this discourse. He writes,

The history of constitutional discourse on secularism however, is a chequered one. Although the Indian constitution incorporated the term secularism into the Constitution only in 1976 through the 42nd Amendment to the Constitution, as Prof Trilokinath Madan notes: 'words apart, the spirit of the Constituent Assembly breathed the ideal of freedom of religion [into the Constitution]' (Madan 2006: 36). Moreover, this did not prevent the judiciary from not only enunciating on the principles of constitutional secularism, but also inscribing it as an essential feature of the basic structure of the Constitution even prior to its inclusion.[44]

Constitutional secularism in India, Cossman and Kapur argue, has been based on the Gandhian model of equal respect for all religions and is characterised by three principles, freedom of religion, equality and non-discrimination, and toleration (1999: 56, 60, 61).[45] They note that 'in stark contrast to the western liberal democratic model, which insists that the relationship [between religion and the state] must be characterized by non-intervention, the "equal respect for all religions" model allows for state intervention in religion, provided that such intervention is in accordance with the principles of equality and freedom of religion' (1999: 60). It is widely acknowledged that this understanding of secularism envisages both an interventionist as well as a reformist role for courts.[46]

However, the history of state intervention in religious matters, as it has played out in the courts, has not been without problems. One of the criticisms against the court's interventionist role centres on the ways in which the courts have determined the scope of the 'religious' domain. Ronojoy Sen argues that the 'court's use of the 'essential practices' doctrine has served as a vehicle for legitimating a rationalized form of high Hinduism and de-legitimating usages of popular Hinduism

'Constitutional secularism is a singularly absent category in the landscape of Indian social theory. The canonical texts have little or no use for the categories and structures of constitutional adjudicative interpretation. Reading secularism is either archaeology of ambivalence in Nehruvian patrimony (Madan; but see Bilgrami), or an aspect of totalizing critique that demonizes secularism as an integral element of the arsenal of the technology of the modernizing Indian state (Nandy). These luminous minds remain unmarked by any serious concern with constitutional interpretive labors and the social costs of their critique of secularism' (2007a: 291). For a detailed analysis of constitutional secularism, see Baxi (1999: 211–233, 2007a, b), Sen (2007, 2010), Dhavan (1987) and Cossman and Kapur (1999).

[44]The celebrated cases of *Keshavananda Bharati*, *Indira Nehru Gandhi* v *Raj Narrain* and the 1994 *Bommai* decision are understood to have cemented secularism into the legal fabric of the country.

[45]They argue that this third principle is what makes Indian secularism different from Western liberal democratic model, which insists on neutrality marked by non-intervention, rather than an intervention which ensures equal treatment (Cossman and Kapur 1999: 60).

[46]The reformist character of state- religion relationship is based on Art 25 of the Constitution which declares that the state shall have the power to regulate any "economic, financial or other secular activity" associated with religious practice [Art 25 (2) (a) of the Constitution] and that the state shall have the power through the law to provide for 'special welfare and reform or the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus' (Article 25 (2) (b) of the Constitution). Furthermore, Article 17 of the Constitution also outlaws the practice of untouchability.

as superstition'.[47] This argument resonates in the context of Muslim practices as well, as evidenced by the decision of the Supreme Court in *Mohd Hanif Quareshi*, where the court refused to recognise a practice that was not 'obligatory' as worthy of protection in the name of the right to religion. The judicial discourse on the privileging of the Hindu sentiment on cow slaughter, as evidenced by several cases, including *Mohd Hanif Quareshi, City of Ahmedabad v Usmanbhai* and *State of Gujarat vs Mirzapur Moti Kureshi Kassab Jamat (*see above), are indicative of the ease with which the court's legitimise a high form of Hinduism without the same level of interrogation to which it is has subjected Muslim practices.

Ironically, one of the most stinging criticisms that has been laid at the door of Indian constitutional secularism is that its reformist role has been reserved for the majority religion, especially when it comes to the arena of personal laws.[48] This in fact forms the bulk of the Hindu right characterisation of left-leaning secularists as pseudo-secularists.[49] Cossman and Kapur argue that it is precisely because the kind of intervention envisaged by the 'equal respect for all religions' model of secularism was left ambiguous (by decision of the courts in Bommai[50]) that religious and fundamentalist forces have endeavoured to claim the terrain of secularism as their own (Cossman and Kapur 1999: 1). A serious blow to constitutional secularism came with the series of judgements which have together been called the Hindutva judgements, in which the court concluded, amongst other things, that an appeal to Hindutva is not per se an appeal to religion.[51]

In such a context, Cossman and Kapur have called for a radical revisioning of each of the principles of secularism in order that they may be put to work towards a secularism of 'equal respect for all religions'. In relation to equality for instance, they argue for a conception of substantive equality to inform the jurisprudence on state intervention, as this, they suggest, allows for a consideration of the 'way in which dominant social and legal practices may be informed by the unstated assumptions of the majority' (Cossman and Kapur 1999: 103). On the right to freedom of religion, they argue that this cannot be based on an *individual* right, but through a recognition that 'religious identity is necessarily constituted in and through a

[47] Sen (2010: 87).

[48] For a discussion of the problematic intervention of the Central govt. post *Shah Bano,* see Baxi (2007a), who along with four others has challenged the constitutionality of the Muslim Women's Act.

[49] Baxi elaborates, 'manifestly, what the redefiners [moderate BJP or Hindu voices] of secularism are directing their energies is on what they perceive as unequal exercise of power of the state "providing for social welfare and reform" of religious practices. The gravamen of their "critique" is that while the state, supported by "pseudo-secularists," has energetically used this power over, and against "Hinduism" it has not deployed this power in relation to Indian Islam, especially in relation to personal law reform' (1999: 223). In relation to this, see Aditya Nigam, on the crisis that the Mandal agitation as well as the growth of dalit politics in India has wrought on the nature of secularism in India.

[50] See footnote 44.

[51] See especially Cossman and Kapur's criticism of the Hindutva judgements. Also see Sen (2007).

broader community', that it is a matter of the collective survival of a community (1999: 109). On the difficult concept of toleration, they argue along with Martha Minow that it cannot mean non-interference, but a 'more active demand [. . .] that may call for changes in dominant institutions' (Cossman and Kapur 1999: 126). They also argue along with Partha Chatterjee (on the terrain of secularism rather than in opposition to it) that the dominant community should extend toleration to the sub-group so long as the pre-requisite of the existence of some structures of accountability and democratic representation within the sub-group are fulfilled. In Cossman and Kapur's assessment, what is appealing about both Minow's and Chatterjee's recommendations is 'the insistence on the importance of group rights and of the rights of cultural minorities to some degree of self-governance and self-determination' as this contributes towards 're-democratizing the principles of Indian secularism' (1999: 132, 133).

The task undertaken by Cossman and Kapur in re-envisioning the category of secularism is a difficult one indeed. Each of the conceptual categories of substantive equality, freedom of religion as a collective right and toleration are the subjects of serious contention, as several of the papers in this volume attest. If the dilemma of accommodating diverging and opposing beliefs and practices in the context of a religiously plural society is to be posed in the context of cow slaughter, a legitimate question to ask would be- 'how are the contesting claims on the regulation of cow slaughter to be dealt with'? However, I believe that in the context of juridical discourse on cow slaughter, we are several steps removed from talk of an 'equal respect of all religions'. Where does the question of accommodating diverging and opposing beliefs and practices arise when such diversity is systematically and persistently controverted through the legitimisation, normalisation and prioritisation of a dominant-caste Hindu ethic masquerading as a wide-spread Hindu belief? At the heart of the debates on cow slaughter are contested ethical claims, and diverse cultural practices. This diversity has been glossed over in favour of the entrenchment of a dominant-caste Hindu ethic. Ecological concerns as they have played out in juridical discourse on cow slaughter have not engaged with the diversity of ecological conceptions that do not neatly equate non-violence and prohibitions on cow slaughter, as the only form of showing either reverence or compassion for the cow. In order to address the question of how the state should deal with religious differences, an essential pre-requisite is the recognition that there *exists* a plurality. In this sense, the juridical discourse on cow slaughter strikes at the heart of constitutional secularism in India.

In his analysis of constitutional secularism, Upendra Baxi has argued that 'we find two sharply divergent figures of law: one which seems deeply subversive of constitutionally cherished conceptions of 'secularism;' the other suggestive of their resilience. The capsule formulation of constitutional ideology of 'secularism' and the vignettes of judicial play with it [...] confirm these contradictory images. (1999: 225)'. It is within the domain of these contradictions that I want to ask the question of what the juridical discourse on cow slaughter tells us about the nature of constitutional secularism in India. There is I believe a productive tension between an

argument that Article 48 provides a constitutive repudiation of the tenets of constitutional secularism and the argument that *within* the domain of constitutional secularism, the state has not *legitimately* intervened. In relation to the first argument, the central difficulty with constitutional secularism is its self-referential nature[52] – and this is especially so, when one considers the problems that are posed by the stipulations *in* the Constitution on cow slaughter. When Baxi asks, 'does the ban on cow slaughter violate constitutional "secularism"'? (Baxi 2007a: 291), the question is – *where* does one seek the answers? In the text of the Constitution, in the Constituent Assembly debates, in the decisions of the Supreme Court (or in a *normative* conception of those principles)? If the tenets of constitutional secularism are derived from the Constitution and the interpretations put to them by the courts, how does one read Article 48 and the judicial discourse on cow slaughter? As an expression of constitutional secularism or as a fundamental constitutive repudiation of its principles? One could argue that because judicial discourse has consistently upheld Article 48, it instances a modification of constitutional secularism to *include* state intervention not for the reform of majority religion but for upholding its purported principles. Whilst this argument has some merit as it undercuts the critiques of pseudo-secularism, the fundamental flaw with this argument is that within the domain of constitutional secularism, understood in terms of substantive equality, the state has not *legitimately* intervened. Instead, juridical discourse has consistently reiterated and prioritised a dominant caste Hindu ethic on cow slaughter.

How then do we deal with the regulations on cow slaughter? If secularism is to have any coherence as a fundamental principle of democratic India, then both Article 48 as well as the laws on cow slaughter have to be repealed.

References

Ambedkar, Bhimrao. 1936a. Annihilation of Caste. In K.L. Chanchreek (ed.), *Social Justice and Political Safeguards for Depressed Classe*. New Delhi: Shree Publishing House.

Ambedkar, Bhimrao. 1936b. A Reply to the Mahatma. In K.L. Chanchreek (ed.), *Social Justice and Political Safeguards for Depressed Classes*. New Delhi: Shree Publishing House.

Ambedkar, Bhimrao. 1948. *The Untouchables: Who Were They and Why They Became Untouchables?* New Delhi: Amrit Book Co.

Ambedkar, Bhimrao. 2002. Origin of Untouchability. In Valerian Rodrigues (ed.), *The Essential Writings of Ambedkar*. New Delhi: Oxford University Press.

Basu, Tapan, et al. 1993. *Khaki Shorts and Saffron Flags: A Critique of the Hindu Right*. New Delhi: Orient Longman.

Baxi, Upendra. 1967. 'The Little Done, The Vast Undone' – Some reflections on reading Granville Austin's The Indian Constitution. *Journal of the Indian Law Institute* 9(3) July–September.

[52]Drawing on Professor P. K. Tripathi's arguments on secularism as a 'product of India's own social experience and genius, Upendra Baxi terms the nature of constitutional secularism its *sui generis* nature' (1999: 220–221). To me, this analysis means that Indian constitutional secularism is a distinct phenomenon; however, the question is whether there are *any normative* principles that distinguish discourses of Indian constitutional secularism.

Baxi, Upendra. 1999. The Constitutional Discourse on Secularism. In Upendra Baxi, et al. (eds.), *Constructing the Republic*. New Delhi: Har Anand Publications, pp. 211–233.
Baxi, Upendra. 2002. The Second Gujarat Catastrophe. *Economic and Political Weekly*. 37: 3519–3531 (August 24th).
Baxi, Upendra. 2007a. Siting Secularism in the Uniform Civil Code: A 'Riddle Wrapped Inside an Enigma'. In Anuradha Dingwaney and Rajeshwari Sunder Rajan (eds.), *The Crisis of Secularism in India*. Durham, NC and London: Duke University Press.
Baxi, Upendra. 2007b. Commentary on Ronojoy Sen. *Legalizing Religion: The Indian Supreme Court and Secularism*. *Policy Studies* 30. Washington, DC: East West Centre.
Bhargava, Rajeev (ed.). 1997. *Secularism and Its Critics*. New Delhi: Oxford University Press.
Chigateri, Shraddha. 2008. Glory to the Cow: Cultural Difference and Social Justice in the Food Hierarchy in India. *South Asia: Journal of South Asian Studies* 31(1): 10–35 (April).
Cossman, Brenda and Ratna Kapur. 1999. *Secularism's Last Sigh? Hindutva and the (Mis) Rule of Law*. New Delhi: Oxford University Press.
Das, Veena. 1990. (ed.) *Mirrors of Violence: Communities, Riots and Survivors in South Asia.* New Delhi: Oxford University Press.
Dhavan, Rajeev. 1987. Religious Freedom in India. *The American Journal of Comparative Law* 35(1): 209–254.
Engineer, Asghar Ali. 2004. Communal Riots 2003. *Counter Currents* (Internet edition) (3 January) http://www.countercurrents.org/engineer-030104.htm. Accessed 23 June 2009.
Engineer, Asghar Ali. 2005. Communal Riots 2004. http://indianmuslims.info/reports_about_indian_muslims/communal_riots_2004_asghar_ali_engineer.html. Accessed 23 June 2009.
Freitag, Sandria B. 1980. Sacred Symbol as Mobilizing Ideology: The North Indian Search for a 'Hindu' Community. *Comparative Studies in Society and History* 22(4): 597–625 (October).
Galanter, M. 1971. Hinduism, Secularism and the Indian Judiciary. *Philosophy East and West* 21(4): 467–487.
Ilaiah, Kancha. 1996. Beef, BJP and Food Rights of People. *Economic and Political Weekly* (June 15th).
Ilaiah, Kancha. 2004. *Buffalo Nationalism: A Critique of Spiritual Fascism*. Kolkata: Samya.
Jha, D.N. 2002. *The Myth of the Holy Cow*. London: Verso.
Jodhka, Surinder and Murli Dhar. 2003. Cow, Caste and Communal Politics. *Economic and Political Weekly* 38(3): 174–176 (18 January).
Krishnakumar, R. 2003. Beef Without Borders. *Frontline* 20(18) (August 30–September 12).
Madan, T.N. 1987. Secularism in Its Place. *The Journal of Asian Studies* 46(4): 747–749.
Madan, T.N. 1993. Whither Indian Secularism? *Modern Asian Studies* 27(3): 667–697.
Madan, T.N. 2006. *Images of the World: Essays on Religion, Secularism and Culture*. New Delhi: Oxford University Press.
Menon, Mukundan. 2005. Cowed Down by the Cow. *Indian Currents* 14(3) (April).
Nandy, Ashis. 1997. The Politics of Secularism and the Recovery of Religious Tolerance. In R. Barghava (ed.), *Secularism and Its Critics*. New Delhi: Oxford University Press.
Nandy, Ashis. 2002. *Time Warps: Silent and Evasive Pasts in Indian Politics and Religion*. New Brunswick, NJ: Rutgers University Press
Nandy, Ashis. 2007. Closing the Debate on Secularism: A Personal Statement. In Anuradha Dingwaney Needham and Rajeshwari Sunder Rajan (eds.), *The Crisis of Secularism in India*. Durham, NC and London: Duke University Press.
Needham, Anuradha and Rajeshwari Sunder Rajan. 2007. Introduction. In Anuradha Dingwaney Needham and Rajeshwari Sunder Rajan (eds.), *The Crisis of Secularism in India*,. Durham, NC and London: Duke University Press.
Needham, Anuradha Dingwaney and Rajeshwari Sunder Rajan (eds.). 2007. *The Crisis of Secularism in India*. Durham, NC and London: Duke University Press.
Nigam, Aditya. 2006. *The Insurrection of Little Selves: The Crisis of Secular-Nationalism in India*. New Delhi: Oxford University Press.
Osella, Caroline. 2008. Introduction. *South Asia Journal of South Asian Studies* 31(1): 1–9.

Pandey, Gyanendra. 1983. Rallying Around the Cow: Sectarian Strife in the Bhojpuri Region, c.1888–1917. In Ranajit Guha (ed.), *Subaltern Studies*, Vol. II. New Delhi: Oxford University Press, pp. 60–129.

Rao, Anupama. 1999. Understanding Sirasgaon: Notes Towards Conceptualising the Role of Law, Caste and Gender in the Case of an 'Atrocity'. In Rajeshwari Rajan (ed.), *Signposts: Gender Issues in Post-independence India*. New Delhi: Kali for Women.

Report of the National Commission on Cattle. 2002. Department of Animal Husbandry & Dairying, Ministry of Agriculture, Government of India. http://dahd.nic.in/nccrep.htm. Accessed on 23 June 2009.

Robb, Peter. 1986. The Challenge of Gau Mata: British Policy and Religious Change in India, 1885–1920. *Modern Asian Studies* 20(2): 283–319.

Sanjana. 2008. An Unholy Crusade. *Tehelka* (Sept). http://www.countercurrents.org/sanjana270908.htm. Accessed 23 June 2009.

Sanjana. 2009. The Devoutly Disobedient, *Tehelka* 6(5) (February). http://www.tehelka.com/story_main41.asp?filename=Ne070209the_devoutly.asp. Accessed 23 June 2009.

Sen, Ronojoy. (with commentary by Upendra Baxi). 2007. *Legalizing Religion: The Indian Supreme Court and Secularism*, Policy Studies, No. 30, Washington, DC: East West Centre.

Sen, Ronojoy. 2010. 'The Indian Supreme Court and the quest for a 'rational' Hinduism'. *South Asian History and Culture* 1(1): 86–104.

Singh, K.S. 1995. *The Scheduled Castes, Anthropological Survey of India*. New Delhi: Oxford University Press.

Smith, Donald. 1963. *India as a Secular State*. Bombay: Oxford University Press.

Statesman News Service. 2008. Dalit, Muslims beaten up for possessing beef (April 2). http://mangalorean.com/news.php?newstype=local&newsid=73134. Accessed 23 June 2009.

Yang, Anand. 1980. Sacred Symbol and Sacred Space in Rural India: Community Mobilization in the 'Anti-Cow Killing' Riot of 1893. *Comparative Studies in Society and History* 25: 576–596.